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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 HICHAM ABOUTAAM,

4 Plaintiff,

5 v.

18 Civ. 8248 (RA)

6 L'OFFICE FEDERALE DE ALA CULTURE
7 DE LA CONFEDERATION SUISSE,
et al.,

8 Defendants.

9 -----x
New York, N.Y.
10 July 8, 2019
11 3:00 p.m.

12 Before:

13 HON. RONNIE ABRAMS

District Judge

14 APPEARANCES

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21 de la Culture de la Confederation Suisse
22 BY: MICHAEL JAFFE
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24 La Republique et Canton de Geneve
25 BY: R. REEVES ANDERSON
MARCUS ASNER

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(Case called)

(In open court)

MR. AINSWORTH: Good afternoon, your Honor. Kevin Ainsworth with Mintz for plaintiff Hicham Aboutaam.

MR. CHAVKIN: Your Honor, Peter Chavkin, also Mintz, for Hicham Aboutaam.

MR. MARMUR: Good afternoon, your Honor. Nathaniel Marmur, M-a-r-m-u-r, for the Beierwaltes.

MR. ANDERSON: Good morning, your Honor.

MR. ABOUTAAM: Good afternoon, your Honor. I'm Hicham Aboutaam.

THE COURT: Yes, good afternoon to you.

MR. ANDERSON: Reeves Anderson from Arnold & Porter for the Republic and Canton of Geneva.

MR. ASNER: Marcus Asner for Geneva.

MR. JAFFE: Michael Jaffe from Pillsbury Winthrop on behalf of the Federal defendants.

MR. BECKER: Steven Becker from Pillsbury Winthrop, also on behalf of the Swiss Federal defendants.

THE COURT: All right. So good afternoon all. So, we're here to discuss the pending motions to dismiss as well as plaintiffs' request for jurisdictional discovery. Who would like to start on behalf of defendants?

MR. ANDERSON: I will, your Honor.

THE COURT: Yes.

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1 MR. ANDERSON: First and foremost, the Foreign
2 Sovereign Immunities Act bars these suits, and I begin there
3 because, first, the immunity question is a threshold
4 jurisdictional question, and foremost because binding circuit
5 precedent forecloses these actions. So, let's begin with what
6 is undisputed. The defendants here are all foreign states, as
7 that term is defined in the Foreign Sovereign Immunities Act.
8 As such, they are entitled to presumptive immunity unless the
9 plaintiffs can establish that one of the narrow exceptions to
10 immunity applies. And the only one that they're relying on so
11 far is the expropriation exception in 1605(a)(3). So, while
12 they bear the burden on each of those, I want to focus on the
13 three aspects that were briefed in our motion.

14 So, the first -- and the statute has been described as
15 abstruse here, so if at any point I can clarify any points here
16 we're going to be unpacking a bit, please let me know.

17 The first is there is no taking. In general, the
18 Second Circuit in the Zappia case defined a taking as the
19 expropriation or nationalization of property. Here the
20 defendants claim no property right in the disputed antiquities.
21 At issue here is a freezing order pursuant to equivalent of a
22 search and seizure warrant issued by the Geneva prosecutor.
23 And the Second Circuit has addressed the specific application
24 in Chettri v. Nepal Rastra Bank. And the court said that there
25 is no authority for the proposition that a routine law

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1 enforcement action constitutes a taking within the meaning of
2 1605(a)(3).

3 THE COURT: Do you think it would make a difference if
4 the property was frozen for a longer period of time, if it was
5 frozen for five years or ten years? At what point would it
6 become a taking?

7 MR. ANDERSON: So, your Honor, I do believe, just as
8 under U.S. juris prudence, there is a period of time where
9 perhaps it could ripen into a taking, but here that has not yet
10 elapsed. There are cases that extend far beyond the two years
11 that are at issue in this case. In fact, Chettri is a good
12 example, the assets were frozen, the bank account in Chettri,
13 in 2008. In 2011 the Nepalese regulators issued an order
14 actually confiscating that and indicting the defendant there on
15 money laundering charges. In 2014 -- so six years after the
16 initial freezing -- this court vacated the default judgment and
17 dismissed the case under the Foreign Sovereign Immunities Act
18 and the Second Circuit affirmed. So, a much longer period than
19 we have here.

20 Now, it could be an open question on indefinite
21 detention, but here there is an ongoing criminal investigation.
22 And by the evidence that the plaintiffs have attached to their
23 complaint and put into the record, they have established that a
24 number of the antiquities that were at dispute have already
25 been released. The investigation is going on apace, and so it

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1 would be both premature to say that this is a taking but also
2 that it has ripened into one. So, that's the first issue on
3 the taking.

4 And here I think the U.S. analog is important. The
5 United States takes property all the time without triggering
6 the taking clause of the Fifth Amendment. And the restatement
7 section -- the Restatement, Third, Foreign Relations Law,
8 Section 712 -- which the plaintiffs rely on -- makes it clear
9 that the line in international law is similar to that drawn in
10 United States juris prudence for purposes of the Fifth and
11 Fourteenth Amendment when determining whether there has been a
12 taking.

13 So, I would point the Court to the two cases that we
14 raised in the motion to dismiss by the federal circuit: The
15 Acadia Tech case, as well as the Amerisource. It said that
16 seizing evidence for either a criminal investigation or for use
17 in a criminal investigation is not a taking, and the innocence
18 of the claimant is irrelevant.

19 And the implications here of finding a taking would be
20 serious. First, it would embroil U.S. courts in litigation
21 over prosecutorial actions taken all over the world. Here this
22 is a routine criminal investigation where the plaintiffs admit
23 the proper procedures of the foreign jurisdiction were
24 followed. If this court were to assert jurisdiction, there
25 would be many more cases like it to follow.

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1 Second, it would be holding foreign governments liable
2 for actions that the United States undertakes all the time.
3 So, since 2017 over \$3 billion worth of assets have been
4 deposited into the Department of Justice's forfeiture fund.
5 The F.B.I., ATF, DEA seize over 700,000 assets annually
6 pursuant to the search and seizure rules and the forfeiture
7 rules of the United States. We would be holding foreign
8 governments to a standard that the United States -- holding
9 them liable for actions the United States undertakes all the
10 time.

11 Unless your Honor has questions about takings, I would
12 like to turn to the "in violation of international law".

13 THE COURT: Let's do that. Thanks.

14 MR. ANDERSON: So, again the Second Circuit's decision
15 in Chettri is dispositive here. The complaint is really about
16 the criticisms that the Geneva prosecutor has undertaken so far
17 in this case. And the Second Circuit said, "Criticisms about
18 the manner in which Nepal has conducted its investigation are
19 insufficient to prove a violation of international law."

20 In the Hilsenrath case -- which was also against the
21 Swiss Confederation in the Ninth Circuit -- they actually found
22 that argument frivolous. "It is frivolous to claim that
23 freezing assets during a legitimate criminal investigation
24 violated international law."

25 THE COURT: What in your view -- or when would a

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1 seizure be in violation of international law, in your view?
2 So, let's say a foreign sovereign took someone's property
3 without any justification or any property. Would a U.S.
4 district court, you know, be permitted to get involved in that
5 point, and would immunity apply?

6 MR. ANDERSON: So, in the Zappia case from the Second
7 Circuit they identified three circumstances that may constitute
8 a violation of international law: If the property was not
9 taken for a public purpose. So, if it was just taken for
10 private gain, let's say the president of the country likes your
11 car and just wants to take it, that's not OK. So, not for a
12 public purpose. The second is if it's discriminatory. If it
13 particularly targets nationals of another state or of another
14 race, that would be a violation of international law. And the
15 third is if it's not done for just compensation. And here this
16 is where the parallel to the U.S. takings jurisprudence is
17 important. Just compensation is not required unless it is a
18 taking in the first instance.

19 So, those are the three examples identified by the
20 Second Circuit reflected in the restatement section on the
21 expropriation exception, and so those are the examples that I
22 would point to.

23 And I think it's important to note here that the
24 plaintiffs can't point to any case that is analogous where
25 there has either found to be a taking or a taking in violation

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1 of international law where a foreign government was exercising
2 its regulatory or police powers just as the Canton of Geneva
3 was doing here with the support of the Federal defendants as
4 well.

5 Finally, the U.S. nexus. So, the Foreign Sovereign
6 Immunities Act is not a carte blanche invitation for U.S.
7 courts to exercise jurisdiction over foreign sovereigns. There
8 must be some connection to the United States.

9 The Foreign Sovereign Immunities Act's expropriation
10 exception creates two distinct tracks which depend on the
11 nature of the Federal -- the foreign defendant. So, the first
12 step is to identify which foreign state's immunity is at stake.
13 Here the Canton of Geneva is admittedly a political
14 subdivision. And there a two classes within the Foreign
15 Sovereign Immunities Act: The first is foreign states -- so
16 foreign states proper and political subdivisions -- and then
17 agencies or instrumentalities. And the difference between
18 those two categories pervades the FSIA. It's in the
19 definitional provision of 1603 and the punitive damages
20 provision of 1606. Foreign states proper are not subject to
21 punitive damages, while agencies and instrumentalities are. It
22 also differentiates between them in service of process as well
23 as execution. So, here is another example where it treats the
24 foreign sovereign proper differently than it treats agencies or
25 instrumentalities.

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1 So, the first prong says you may exercise jurisdiction
2 if the property is present in the United States in connection
3 with the commercial activity of the foreign state. That's a
4 very high bar. And admittedly the property is not in the
5 United States, and so the first prong which applies to foreign
6 states absolutely does not apply. And I think that is the
7 cleanest way to dismiss this case.

8 The second prong specifically refers to agencies or
9 instrumentalities. It says if an agency or instrumentality
10 owns or operates that property wherever in the world, and they
11 conduct commercial activities in the United States, that's a
12 sufficient U.S. nexus. And the reason those two are different
13 is because it's more delicate to exercise jurisdiction over the
14 foreign sovereign proper than it is necessarily for a company
15 that happens to be majority owned by a foreign state.

16 So, the juxtaposition between those two prongs has
17 been recognized time and again. In the Second Circuit, Judge
18 Cabranes' decision in Garb spent quite some time
19 differentiating the two prongs and explaining that only the
20 first prong could be used to assert jurisdiction over a foreign
21 state or a political subdivision.

22 The most extensive explication that I am aware of is
23 the de Csepel case against Hungary in the D.C. Circuit. But
24 even as recently as early this year the United States has in an
25 amicus brief to the Supreme Court in detail explained why only

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1 the first prong would apply to a foreign state.

2 Now, here, because the property is located in Geneva,
3 plaintiffs are forced to argue a novel interpretation, which is
4 that if the second prong could apply to some agency or
5 instrumentality, then those contacts must be imputed up to the
6 foreign state and perhaps every single agency or
7 instrumentality in every subdivision of the foreign state. No
8 case has ever so held, for good reason. It's contrary to the
9 text, structure and purpose of the Foreign Sovereign Immunities
10 Act, which treats the foreign state differently than agencies
11 or instrumentalities.

12 Finally, the agency or instrumentality that they focus
13 on here -- the Federal Office of Culture -- is not an agency or
14 instrumentality of Geneva. So, even if their legal rule
15 applied, it wouldn't extend to Geneva. So, it would extend to
16 perhaps Switzerland, the Swiss Confederation, but we are a
17 political subdivision, and therefore even under the legal
18 theory that they have brought for this case, it would not be
19 sufficient to assert jurisdiction over the Canton of Geneva.

20 THE COURT: Thanks very much.

21 MR. JAFFE: Good afternoon, your Honor.

22 THE COURT: Good afternoon.

23 MR. JAFFE: In assessing whether the Federal Office of
24 Culture or the customs administration is part of the central
25 government, or alternatively an agency or instrumentality, the

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1 Garb decision makes clear what you look at is -- you answer two
2 questions: How are they formed and what is their purpose?

3 The "how is they formed" is reflected in two places:
4 Exhibit 3 to Mr. Becker's affidavit, where you have the Swiss
5 government announcing to the World Trade Organization the
6 structure of the central government. And under the structure
7 of the central government you have both the Office of Culture
8 and you have the Customs Administration. That's a declaration
9 to the world that those entities will be responding based upon
10 their central government status. There are other tables, other
11 schedules that deal with agencies, instrumentalities, not the
12 central government.

13 Secondly, there is the Nussbaum affidavit. Mr.
14 Nussbaum, who is with the Customs Administration and a Swiss
15 lawyer, testifies that, one, they are not separately
16 incorporated; they are parts of the departments under which
17 they are logged. They do not have any independent existence
18 beyond the central government. And, in addition to that, they
19 report to the executive of the central government.

20 THE COURT: But why should I rely just on your
21 submissions as opposed to allowing jurisdictional discovery as
22 plaintiff requests?

23 MR. JAFFE: A few reasons, your Honor.

24 First, if our evidence could be challenged, presumably
25 a Swiss lawyer or a Swiss law professor would have given an

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1 affidavit that says, no, no, no, Mr. Nussbaum got it wrong, Mr.
2 Nussbaum didn't give you the full story. But these are
3 official publications of the Swiss government, the Becker
4 affidavit Exhibit 3. Under our rules mere allegations are
5 trumped by affidavits under law. And if there were a basis for
6 challenging them, first, the plaintiffs could have come forward
7 with an affidavit that says, no, no, no, no, they got it wrong,
8 they didn't tell you the whole story, there is more to it,
9 there is something else there. But they didn't do any of that.
10 And these points were not made in a reply paper, they were made
11 in our opening papers, so they had plenty of opportunity to
12 address it.

13 Then when your Honor was good enough to allow them to
14 ask for jurisdictional discovery, there was no indication that
15 what they want to do is pursue Mr. Nussbaum's affidavit because
16 he was wrong, because there is a basis on which they could
17 challenge what he said.

18 When we in response said, where is your discovery
19 plan, how are you going to help the court identify the issues
20 and resolve the jurisdictional questions, their response was we
21 don't have one at this point, we don't have to have one at this
22 point, it touches all of the issues in this case.

23 Well, under the decisions that we cited in our papers
24 and which our colleagues on behalf of Geneva cited, it's not
25 enough simply to say we could do it, let us go after the

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1 foreign sovereign and take jurisdictional discovery. Before
2 you can do that there has to be more than a prima facie
3 showing, more than simply a good faith allegation. There needs
4 to be in the words of the Supreme Court in *Boliviano*, there
5 needs to be hard evidence that in fact there is subject matter
6 jurisdiction and then presumption that there is subject matter
7 jurisdiction, which is just the contrary of what we have here.

8 So, the answer to your Honor's question, if there was
9 something to it, the plaintiffs had more than an adequate
10 opportunity to address it. They could have addressed it, as I
11 said before, with an affidavit from a Swiss law professor, from
12 a Swiss lawyer, from someone in a U.S. law school who is astute
13 about matters of Swiss law.

14 Secondly, when we said, where is your plan, who do you
15 want to take discovery from, how are you going to help the
16 court reach the right decision, their response was we don't
17 have one at this point but if we're allowed to take discovery
18 we will articulate it. It seems to me that's putting the cart
19 before the horse.

20 Jurisdictional discovery is narrowly cabined in these
21 kinds of cases, and it requires a showing that in fact the
22 narrowly cabined discovery that you want to take will bear on
23 the issues that the court has to decide and will assist the
24 court in making that decision.

25 So, the first prong of the test -- are we dealing with

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1 agencies and instrumentalities, or are we dealing with parts of
2 the central government -- both the official pronunciations from
3 the Swiss federal government and the Nussbaum affidavit make
4 plain the facts set forth in those sworn papers trump the mere
5 allegations in the complaints and, frankly, the argument of
6 counsel.

7 As plaintiffs themselves somewhat ironically say in
8 their papers, the allegations or the arguments of Geneva's
9 counsel should not be taken at face because there are other
10 allegations. It may be so that if it's allegation versus
11 allegation you're in equipoise, but when it's sworn testimony
12 versus allegation, you're no longer in equipoise.

13 The second prong of the test is that -- actually, One
14 other point, your Honor. When it comes to the two federal
15 departments, with respect to Customs, what is the purpose of
16 Customs? Enforce the tax laws, enforce the importation laws.
17 Plaintiffs make no argument at all that the Customs
18 Administration is anything but part of the central government.

19 When it comes to the Office of Culture, what they do
20 is they look at not the core functions that the Garb decision
21 requires, but they look at some peripheral activities.

22 We provided to the Court the mission statement of the
23 Office of Culture, and it says that "The Federal Office of
24 Culture is the strategic body responsible for drawing up and
25 implementing the Confederation's culture policy. It's remit

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1 covers tasks that are strictly reserved to the Confederation,
2 namely improving the institutional framework, drafting
3 enactments in the culture sector, reviewing the compatibility
4 of enactments in other political areas, value added tax,
5 international free trade, vocational education, languages,
6 etcetera, with the needs of culture in coordination with the
7 Federal Department of Foreign Affairs, negotiating agreements
8 in the cultural sector." And it goes on.

9 None of that is challenged. There isn't an affidavit
10 that says, yeah, but there is more than that, that's not the
11 core, their mission statement got it wrong, under this piece of
12 legislation or that article there is more to it. But there is
13 no challenge to that mission statement. It is inconceivable
14 that one would say that's a mission statement that describes a
15 commercial activity. It's just the opposite, it's expressly
16 carrying on the functions specifically reserved to the
17 Confederation.

18 When it comes to the Customs Administration, I've
19 already indicated there is no argument that they have any
20 commercial activity. When it comes to culture, they point to
21 some peripheral activities, for example, publishing books.

22 To be sure, there are books on the Internet that one
23 can buy where the Office of Culture is listed as the editor,
24 but there are more than 7,000 books on the Internet that one
25 can buy produced by various departments of the United States

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1 government, including such treatises as Defense Department's
2 book Cookbook for Large Gatherings. The fact that the Defense
3 Department published a book or 7,000 books on a myriad of
4 topics doesn't change it from being part of the central
5 government of the United States to an agency or instrumentality
6 of the United States.

7 When it comes to owned or operated -- which is the
8 second prong that has to be satisfied -- there is no argument
9 that the Customs Administration is owning or operating
10 anything.

11 So, it comes to the Office of Culture. And what do
12 they say in that regard? They start off by saying that the
13 Office of Culture is responsible for repatriating goods that
14 have been confiscated. Secondly, the Office of Culture
15 cooperates with other parts of the Swiss government. Perhaps
16 that's like the F.B.I. cooperating with the Department of
17 Commerce, or the CIA cooperating with the Department of State.
18 That doesn't make the CIA part of the State Department, and it
19 doesn't make the State Department part of the CIA. And the
20 same could be true for any number of federal agencies that
21 cooperate one with the other.

22 They say that the Federal Office of Culture voiced its
23 suspicions to the Geneva prosecutor and that led to the
24 seizures about which they complain. Again, under Swiss law
25 it's entirely appropriate if one part of the federal government

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1 sees a problem, for them to report it to the appropriate
2 authority. Here the appropriate authority is outside of the
3 federal government, it's the Canton of Geneva and it's the
4 prosecutor in Geneva, and that's exactly what taking the
5 allegations of the complaint at face -- it's exactly what they
6 say happened. That doesn't put the Office of Culture as making
7 them the owner or the operator of any of the artworks.

8 Lastly, they say that because you were there at the
9 commencement -- namely you the Office of Culture raised
10 suspicion -- and you will be there if the goods are ever
11 confiscated -- which is a step beyond the seizure -- you will
12 be responsible for repatriating, therefore you must be in
13 control in the middle. That's exactly the opposite of what the
14 Nussbaum affidavit says; it's exactly the opposite of what the
15 statutory provisions that we've cited to your Honor say.

16 In fact, during the process, the Office of Culture,
17 the Customs Administration, have no control at all over the
18 decisions being made by the prosecutor in Geneva. And as
19 counsel has already argued, those proceedings are in accordance
20 with and accepted values of international law.

21 The last point that I think we should make -- and I
22 guess -- does your Honor want to deal separately with the
23 jurisdictional discovery issue, or should we address that at
24 this point as well?

25 THE COURT: Either way. I mean you're welcome to

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1 address it now.

2 MR. JAFFE: Well, I think the principal arguments as
3 to why jurisdictional discovery is not appropriate here are
4 twofold: One, there is no showing of what it's going to be or
5 how it's going to help the court. Two, when it comes to our
6 clients, we rely solely upon the public record, the statements
7 of the Swiss central government itself both in the World Trade
8 Organization and in the statutory sections that we've called to
9 the attention of the Court; and, secondly, upon the affidavit
10 of Mr. Nussbaum.

11 If we got it wrong, as I said before, it would have
12 been an easy matter to find a Swiss law professor, a Swiss
13 lawyer, a law professor here in the United States, to say they
14 got it wrong, they left something out. We didn't hear any of
15 that.

16 Instead, what you have when it comes to ownership and
17 control, for example, are suspicions, suggestions, a long way
18 from any evidentiary proof that this court could establish. It
19 doesn't even pass an Iqbal test.

20 So, with respect to jurisdictional discovery under the
21 arts decision that our colleague cited in one of the letters in
22 May back to the Court -- I think it was the May 15 letter --
23 you don't undertake jurisdictional discovery without their
24 being a firm foundation for the court to see its way to say,
25 yes, if you take this discovery it could make a difference.

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1 Here we have no idea what discovery they want to take,
2 much less how it could make a difference. And they've had
3 plenty of opportunity to address the court through affidavits
4 of their own, which would be commonly done if in fact there
5 were a basis for challenging either the public pronouncements
6 or interpretation of them or challenging Mr. Nussbaum's
7 testimony.

8 THE COURT: All right. Thank you.

9 MR. JAFFE: Two further comments, your Honor: One
10 with respect to the act-of-state doctrine, and secondly with
11 respect to comity.

12 The very reason for those two doctrines is that it's
13 inappropriate for U.S. courts to inject itself into regular
14 proceedings in a foreign country. There is no suggestion
15 here -- there is certainly no proof -- that the Swiss
16 government, the Canton of Geneva, are incapable of providing a
17 fair and equitable proceeding, that it would be futile for the
18 plaintiffs to pursue their rights in Switzerland.

19 But also importantly, the only basis upon which the
20 act-of-state doctrine is challenged is the second Hickenlooper
21 Amendment. But as we point out in our papers, that amendment
22 doesn't apply because it only deals with property located in
23 the United States.

24 So, as a matter of comity to the Swiss proceedings, as
25 a matter of law with respect to the Hickenlooper Amendment,

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1 neither the act-of-state doctrine nor comity are ruled out, and
2 we think that both are applicable here as reasons why this
3 Court should stay it's hand, as well as the comments made by my
4 cocounsel on behalf of Geneva.

5 THE COURT: Thank you.

6 Who would like to be heard on behalf of plaintiffs?

7 MR. AINSWORTH: Your Honor, I didn't hear what you
8 said.

9 THE COURT: Sorry?

10 MR. AINSWORTH: I did not hear what you said.

11 THE COURT: I said who would like to be heard on
12 behalf of plaintiffs. I know it can be hard to hear, so I'm
13 going to remind everyone to speak into the mics, including me.

14 MR. AINSWORTH: Kevin Ainsworth, your Honor. And is
15 this volume sufficient?

16 THE COURT: Yes. Just bring the microphone a little
17 closer. And I'm going to ask you to start where Mr. Anderson
18 started, which is whether you have any cases that you can cite
19 suggesting that a seizure of this sort constituted a taking in
20 violation of international law.

21 MR. AINSWORTH: Your Honor, this is a unique
22 situation.

23 THE COURT: Is it? Why is it unique?

24 MR. AINSWORTH: For one thing, international law
25 permeates everything that was done; and the nature of what was

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1 seized is unique in the cases. Right? So, if it weren't for
2 the UNESCO Convention there would be no seizure. There was an
3 international agreement in 1970, the UNESCO Convention.
4 Switzerland signed on to it in the early 2000s and made it
5 effective in Switzerland in June of 2005, expressly not
6 retroactive. And it's not like you can walk into a store or
7 warehouse and look at an antiquity and say, boy, that looks
8 like it might have been stolen. It could be thousands of years
9 old. It could be hundreds of years old. You don't know where
10 it came from. So to just look at something and say, boy, that
11 might have been stolen is ridiculous.

12 Switzerland, Geneva -- this was not seized with an
13 idea to return it to the neighbor and say this was stolen from
14 the store next door. This was seized purportedly under the
15 implementing regulations -- implementing statute in
16 Switzerland, the Cultural Property Transfer Act, which
17 implemented the UNESCO Convention, for the purpose of
18 repatriating to another country. No other country has laid
19 claim to this. It's not like somebody said Mr. Hicham has got
20 our property. The prosecutor walked in and said I'm seizing
21 all of this, some of it might have been stolen. Right?

22 THE COURT: But they're still investigating, right?

23 MR. AINSWORTH: Are they? That's what they say, your
24 Honor. But let's take it from the beginning.

25 The Cultural Property Transfer Act, it's not

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1 retroactive, it doesn't apply to anything acquired before 2005.
2 Mr. Aboutaam inherited much of his collection from his father
3 in the '90s; he has collected things since then; it has been
4 stored in the warehouse there for decades. So, there is a
5 question right off the bat whether there was any good faith
6 effort to determine the date of acquisition.

7 Under the Cultural Property Transfer Act there is no
8 illicit importation into Switzerland until Switzerland has a
9 bilateral agreement with another country. The first of those
10 was 2008 with Italy. There is only a handful of others. So,
11 in order to look at something and say that was illicitly
12 imported, you have no know the country of origin and the date
13 of importation. There is no evidence that any of this was
14 known. It was just a purely arbitrary act. They had suspicion
15 as to seven items, they seized 12,000.

16 THE COURT: So let me step back. So you're focusing
17 on what is arbitrary, as you did in your papers. What's your
18 basis for even saying that an arbitrary seizure is a violation
19 of international law?

20 MR. AINSWORTH: Your Honor, I want to thank counsel
21 for repeatedly pounding the Zappia case, because, by the way,
22 the court found that there was -- that the country at issue
23 there hadn't done any taking, so there was no jurisdiction, so
24 its discussion on the expropriation is dicta. But it did cite
25 to the Congressional record as the source of its definition of

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1 taking, and it paraphrased, I will quote, the Congressional
2 record states: "The term "taken in violation of international
3 law" would include the nationalization or expropriation of
4 property without payment of the prompt, adequate and effective
5 compensation required by international law. It would also
6 include takings which are arbitrary or discriminatory in
7 nature." So, that's the basis of Congress enacting the
8 expropriation exception, to cover arbitrary takings, with we
9 clearly have here.

10 THE COURT: But again you don't have any cases in
11 which a court has said that law enforcement in a foreign
12 country acted arbitrarily in seizing someone's property.

13 MR. AINSWORTH: I think if it's in our papers, your
14 Honor, we have it. I can't think of one off the top of my
15 head. It would have been in there.

16 What we've got is the U.S. juris prudence talking
17 about arbitrariness giving rise to constitutional rights.
18 Right? An arbitrary action by the government gives right to
19 due process claims in the United States. So, it's not like we
20 in the U.S. don't recognize that arbitrary actions give rise to
21 claims.

22 Defendants here are arguing they had no reason
23 whatsoever; they could seize the whole warehouse because they
24 wanted to and then investigate and that would be fine. That's
25 not what the law is. It says taken in violation of

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1 international law, and that incorporates the arbitrariness.

2 THE COURT: Walk me through why this is a violation of
3 international law. Like actually walk me through what aspect
4 of international law has been violated here. Point me to
5 specific provisions and walk me through it.

6 MR. AINSWORTH: Well, your Honor, there is the
7 restatement that we cited in our brief.

8 THE COURT: I mean I think you talk about the CPTA,
9 but the CPTA is Swiss law, right?

10 MR. AINSWORTH: The CPTA --

11 THE COURT: Even if the seizure did not comply with
12 the CPTA, that wouldn't constitute a violation of international
13 law because that's Swiss law, right?

14 MR. AINSWORTH: The CPTA law is the implementing act.

15 THE COURT: Right, so I'm just clarifying, that's
16 Swiss law, that's not international law.

17 MR. AINSWORTH: That's Swiss federal law, that's
18 correct.

19 THE COURT: Right. So then you talk about the UNESCO
20 Convention, but it was unclear to me which provision you were
21 saying again had been violated.

22 MR. AINSWORTH: Your Honor, the UNESCO Convention
23 talks about one country making a request to another for
24 repatriation. There was no request by any country, so there is
25 no implementing or initiating action by another country under

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1 the UNESCO Convection.

2 THE COURT: So where is the violation of the
3 international law?

4 MR. AINSWORTH: It's the arbitrary taking of the
5 rights -- of the property, your Honor, as identified in the
6 House report. An arbitrary taking is --

7 THE COURT: And what support do you have that even
8 defines arbitrary in any way? I mean here we have Swiss law
9 enforcement determining that there was a sufficient
10 justification for this seizure. Point me to any support for
11 the notion that this was an arbitrary taking.

12 MR. AINSWORTH: Your Honor, just refer to restatement
13 712. "An act is unfair, unreasonable and inflicts serious
14 injury to establish rights of foreign nationals." It's in
15 reporter's note we cite on page 8 of our memorandum, your
16 Honor.

17 THE COURT: But you don't have anything else that can
18 provide any guidance as to what constitutes arbitrary
19 conduct -- or an arbitrary seizure.

20 MR. AINSWORTH: I point out, your Honor, that the
21 defendants themselves conceded that at some point it will ripen
22 into a taking. Right? So, they want to say it's not
23 arbitrary. It's not a taking now but --

24 THE COURT: There is a difference between the taking.
25 I think the concession at least in the response to my question

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1 is when does something become a taking. At a certain point
2 something becomes a taking. But then there is a taking in
3 violation of international law, which is I understand your
4 position to be where it needs to be arbitrary. Is that right?

5 MR. AINSWORTH: Yes, your Honor.

6 THE COURT: I am just asking for any support in the
7 law for the notion that this seizure was arbitrary in nature
8 and in violation of international law.

9 MR. AINSWORTH: Your Honor, we've got, as I said, the
10 restatement, the House report, and the juris prudence we had
11 cited regarding arbitrary actions under the U.S. juris
12 prudence. So due process violations, an arbitrary action by
13 police, can be challenged for violation of due process.

14 THE COURT: Why haven't your clients engaged in the
15 appellate process available in Switzerland?

16 MR. AINSWORTH: Your Honor, Mr. Hicham Aboutaam is a
17 U.S. citizen; he had written to the prosecutor there and the
18 authorities, and got answers basically demanding that he prove
19 he owned the property, reversing the burden of proof under the
20 UNESCO Convention, and decided that he was going to get better
21 treatment here, and he is entitled to file a lawsuit here under
22 the FSIA, so he wanted to seek that relief here, your Honor.

23 THE COURT: How do you respond to defendants' reliance
24 on the Chettri case with respect to the taking?

25 MR. AINSWORTH: Chettri there was evidence of

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1 wrongdoing, first of all. It was a transfer between banks, and
2 one of the banks contacted the other and said they hadn't
3 received adequate documentation of the source of the funds that
4 had been wired, so they froze it. So, that was clearcut
5 evidence of wrongdoing. There was actually a later forfeiture
6 action brought and criminal action brought.

7 What we didn't have is, as I say here, where you've
8 got a pitcher that could have originated from any country
9 around the world in the last thousand years and somebody said,
10 gee, I think that's suspicious, I think that was improperly
11 imported into the country. And not only did Geneva did that
12 with regard to a pitcher, they did it with regard to 12,000
13 pieces, 5,000 of which they finally released last August after
14 the first lawsuit was filed. That itself is an admission that
15 they had no basis to the 5,000. So, they're still holding
16 7,000 total, 1200 of which are Mr. Aboutaam's.

17 THE COURT: Is there anything else you'd like to say
18 today?

19 MR. AINSWORTH: Yes, your Honor, there is quite a few
20 points that counsel made that need to be addressed. First of
21 all, we didn't concede that they followed their procedure at
22 all. That was in their papers and he said it today. We have
23 not conceded that. We have argued consistently that this was a
24 violation of, as your Honor pointed out, the Cultural Property
25 Transfer Act.

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1 Mr. Nussbaum in his opening affirmation or his only
2 affirmation did not discuss the core function of the Federal
3 Office of Culture, so their argument that we didn't respond to
4 it is specious.

5 And, in fact, your Honor, we provided to the Court as
6 Exhibit 21 to my declaration, which is document 46, the Federal
7 Office of Culture's annual report, and in there at page 70 it
8 shows a budget, your Honor, and the vast majority of their
9 budget is on commercial purposes. It talks about subsidizing
10 film, heritage, schools, communicational language, museums,
11 promotional cultural organizations, awards. So, we did provide
12 evidence to suggest that the Office of Culture's core function
13 is other than governmental.

14 THE COURT: Even if I were to agree with you with
15 respect to FOC, tell me your argument as how I could retain
16 jurisdiction as to the other two defendants.

17 MR. AINSWORTH: Your Honor, that's an interpretation
18 of the Section 1605. And we cited the Cassirer decision of the
19 Ninth Circuit on this point. 1605(a) begins with a foreign
20 state shall not be immune when one of these subsections are
21 satisfied. Subsection 3 is satisfied by the Foreign Office of
22 Culture, so the foreign state being Switzerland loses its
23 immunity as a result of the Office of Culture satisfying
24 subsection 3.

25 Geneva holds the property -- your Honor, Geneva acted

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1 purportedly in connection with the federal statute here;
2 they're implementing Swiss federal law, or claim to be. At the
3 peak of that pyramid is the Office of Culture. The CPTA puts
4 the Office of Culture responsible not only for initiating the
5 actions and repatriating property but for storing the property
6 in the meantime, storing seized property, so the Office of
7 Culture is integral to the whole process.

8 THE COURT: With respect to the jurisdictional
9 discovery that you're seeking regarding whether the FOC is an
10 agency or an instrumentality of the foreign state, what would
11 that discovery look like?

12 MR. AINSWORTH: Your Honor, we imagine first we would
13 put up document requests and interrogatories. Right?

14 THE COURT: But what are you looking for?

15 MR. AINSWORTH: Well, we have seen mandate from
16 Customs to an expert who was hired to evaluate some of this
17 material, to determine whether or not it meets any of the --
18 well, apparently to determine whether or not it meets any
19 repatriation requirements.

20 THE COURT: But you could have hired an expert at this
21 point in time. I mean what exactly are you going to seek in
22 jurisdictional discovery? What are you asking for?

23 MR. AINSWORTH: We've seen enough to show that there
24 is cooperation, coordination between the Office of Culture and
25 the Geneva prosecutor, is what I'm getting at, the mandate

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1 related to that. If they want to argue that they're completely
2 independent, I think we've got enough evidence to show that
3 that's not true. And if the Court needs to make a fact finding
4 on that, then we want to have discovery as to the degree of
5 coordination and cooperation and control by the Office of
6 Culture over this process.

7 THE COURT: And do you know of any cases where
8 jurisdictional discovery of this sort has been ordered?

9 MR. AINSWORTH: Your Honor, the case they cited
10 against discovery -- I need a second to find it -- in fact
11 ordered discovery.

12 THE COURT: But I'm talking about where there is a
13 subdivision of a foreign government -- or jurisdictional
14 discovery on the question of whether a subdivision of a foreign
15 government is the foreign state itself or an agency or
16 instrumentality. Do you have any cases where a court has
17 ordered jurisdictional discovery of that sort?

18 MR. AINSWORTH: Your Honor, I don't recall off the top
19 of my head. I would have to send that in if we have it. But I
20 do point out, as I said, that we've presented evidence that the
21 Office of Culture's core function is commercial -- substantial
22 evidence. So, I'm not even sure discovery is needed at this
23 point because their evidence is outweighed by ours. But if
24 the Court felt that was not the case, then certainly there is a
25 fact finding to be done. And there is Supreme Court authority

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1 and Second Circuit authority for the proposition of having
2 discovery to determine the facts relevant to jurisdiction.

3 Your Honor, if I may just have a moment to go over my
4 notes here.

5 THE COURT: Sure.

6 MR. AINSWORTH: Your Honor, the defendants cited not
7 only Chettri but Acadia and Amerisource, and the interesting
8 things about all of those cases is that there really was no
9 dispute as to the validity of the underlying investigation.
10 And that's not what is going on here. Like I said, we can't
11 look at an antiquity and decide that looks suspicious. There
12 is more to it than that. And they seized a whole warehouse for
13 no reason. It's an exercise, a flex of muscle, but it's
14 arbitrary.

15 Thank you, your Honor.

16 THE COURT: All right. Thank you.

17 Do you want to respond?

18 MR. MARMUR: If I may for the plaintiffs Beierwaltes.

19 THE COURT: Oh, yes, please.

20 MR. MARMUR: And since we adopt the arguments of
21 Hicham Aboutaam, I'm not going to repeat those. Some of them
22 may come up again, but I won't take more than a few minutes of
23 your time.

24 But I did think that it was important to highlight in
25 the context of the Beierwalteses why the actions here are both

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1 arbitrary and in violation of international law, which I think
2 are two of the issues that your Honor has focused on, and so
3 let me just paint the picture from the Beierwalteses'
4 perspective of what is going on here.

5 THE COURT: Sure.

6 MR. MARMUR: There are 18 pieces worth about \$8
7 million that were consigned to Phoenix -- not Mr. Aboutaam but
8 Ali Aboutaam's company -- for the purpose of obtaining money to
9 repay certain creditors. There has never been a single
10 question that they were bona fide purchasers of these items.
11 They bought them at auction. They bought them -- and this is
12 alleged in the complaint -- with good provenance, that they
13 checked registries, they checked the UCC. Never a question
14 that there was a problem with them.

15 Number two, those items were consigned to Phoenix in
16 2006, which is before Switzerland entered into a single
17 bilateral agreement with another country, meaning under both
18 UNESCO and as applied in Switzerland as adopted by the CPTA
19 there is no question that those pieces cannot violate the law
20 because the law says were they acquired after the adoption of a
21 bilateral agreement. So, if they --

22 THE COURT: Have you made those arguments been made in
23 Switzerland?

24 MR. MARMUR: No. And this is part of the problem,
25 your Honor, in terms of you asked what is the violation of

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1 international law. UNESCO puts the burden on the country that
2 is taking the items to demonstrate that there is a problem and
3 to show that they need to be repatriated. So, what they did
4 when we asked them to say, well, what is the problem here, they
5 turned it around on us; they said, well, show us your proof of
6 provenance, and we said, well, that's not how this works;
7 international law says you are supposed to establish that.

8 So, that is one of the answers to the question I think
9 you posed before, which is what is the violation of
10 international law. It is shifting the burden of proof. It's
11 like the analogy would be in our country is taking property
12 without a warrant as to at least my client's pieces and then
13 saying, well, give them back, they said, no, you tell us why
14 they're good. That's not how it works, and it's not how it
15 works under UNESCO.

16 Now, having taken those pieces they kept them for two
17 and a half years without any request. There is no articulable
18 suspicion as to any of the Beierwaltes pieces. It was not the
19 one piece that originally was problematic or allegedly
20 problematic when it was discovered in a car. It was not one of
21 only seven of 12,000 pieces that served as a basis for that
22 extraordinary seizure, and that's to a large extent the
23 Aboutaams'. But it really is highlighted with respect to the
24 Beierwaltes, because none of that is problematic.

25 So, what that says is if a number of people consign to

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1 a dealer certain properties and they keep them in a warehouse,
2 if there is allegations that a few of those pieces as to a
3 certain consigner may be problematic, we are for every one of
4 those pieces are going to seize like 2,000 more of anybody else
5 in that warehouse. That's like saying somebody complains about
6 a piece in the Metropolitan Museum of Art, we're going to seize
7 the entire first floor.

8 And that's not fair I don't think to them, but for my
9 clients it's certainly not fair where there has been no
10 articulable suspicion. They continue to hold this. There has
11 been no request for repatriation. The facts are absolutely
12 clear that this was acquired -- or at least it's alleged and
13 there has never been a dispute that they have been acquired
14 before entering into any bilateral agreement. They have now
15 kept them for two and a half years. They have not told us why
16 there is a problem with it. They have not compensated -- which
17 is the last part of the violation of international law. If
18 you're going to take, you have to pay for it if eventually it's
19 repatriated.

20 So, to try to say, well, we haven't repatriated, we
21 are just keeping it, so we don't have to pay you, which can --
22 as I think your Honor was getting at -- last indefinitely. And
23 while this isn't indefinite yet, there has been absolutely
24 nothing in those two and a half years to tell us why you have
25 our pieces.

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1 So, at some point we should be able to come to a New
2 York court, a federal court in the United States, under the
3 FSIA, which provides a framework, and say, look, we are
4 entitled to our pieces back, or a declaration as to that; we're
5 not required to go to Switzerland. That is, there is no
6 exhaustion requirement. We can do it here as long as we meet
7 the statutory criteria.

8 And I want to just hit one other piece --
9 Mr. Ainsworth covered it well -- but this point about the FOC,
10 whether it has certain governmental missions -- which is what
11 they keep saying, there is a governmental mission statement --
12 is largely an irrelevancy. It is not the purpose of the Act,
13 the Agency's Act. It is whether an individual, a private
14 person, can engage in those acts.

15 For example, if New York City runs the Metropolitan
16 Museum of Art, then that may have a governmental purpose of
17 promoting the arts, but it is also something that an individual
18 can do. An individual can promote the arts. An individual can
19 open up a Swiss arts culture program in New York to promote
20 Swiss arts and Swiss language. And I don't believe you
21 mentioned the Failla decision, the Barnett case from about two
22 weeks ago -- I can provide the cite to you. It just came out,
23 so it was not in our papers.

24 THE COURT: Why don't you.

25 MR. MARMUR: Sure. The cite that I have is a Lexis

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1 cite, and it's 2019 U.S. District Lexis 104313. And if I could
2 just summarize the facts and the holding there. And I am using
3 this case by analogy but to illustrate the distinction between
4 a governmental act and a commercial act.

5 What happened there was Sotheby's is having an
6 auction, Greece sends a letter and says, you know, one of these
7 pieces is stolen from Greece, you can't sell it, which of
8 course calls into question the provenance of the item, and an
9 auctioneer really can't sell it because it can't guarantee
10 clear title, so there is a declaratory judgment action brought
11 by the seller, the Barnetts, saying please declare this to be
12 valid. And the question there arises under the FSIA was Greece
13 sending that letter a governmental or a commercial act. And
14 Greece says, of course, well, look we're doing this because
15 it's our culture heritage, it's our property taken from our
16 soil, and we want it back, and that's part of our government
17 mission in Greece, to keep our pieces. And the Barnetts say,
18 no, no, no, it doesn't matter, that's not the point, the point
19 is that you wrote a letter to an auction house that says give
20 us this piece back, it's ours. That's something that anybody
21 can do. Anybody can write a letter and say return our piece.
22 And Judge Failla says that's right, it's not the purpose, it's
23 not the mission that's important, it's whether a private person
24 can do it.

25 So, I have no doubt that the Federal Office of Culture

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1 of Switzerland has a mission, a governmental mission or purpose
2 to support the arts and culture of Switzerland, but what they
3 do, how they carried out that mission is something that for the
4 most part anybody can do. And the question is which
5 predominates.

6 And whereas I think both sides have put in some
7 evidence on that point, I believe we have the better of it when
8 you look at what they actually do. But to that extent, if the
9 question is what is jurisdictional discovery going to get us,
10 on that question we can get more discovery to see whether it is
11 an instrument or whether it's an agency or instrumentality,
12 because I think that is more nuanced in terms of what
13 predominates, and we could find out who the people are who run
14 it, whether they do more governmental acts liken enacting or
15 proposing legislation or things that could be construed as
16 solely governmental.

17 And just as a final point on that, they've made these
18 arguments -- defense made these arguments that, well, just
19 because the Department of Defense publishes a book, therefore,
20 you know, we're saying that they're an instrumentality of the
21 government as opposed to part of it. That's not what we're
22 saying at all.

23 There is no doubt that the Department of Defense has
24 an overwhelming government function and that private people
25 cannot build bombs and engage the military and carry out

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1 military operations. So, that's clearly in that camp. But the
2 whole point of this part of the statute is to recognize that
3 there are agencies and instrumentalities that don't fall into a
4 core governmental function like defense, or legislation, or
5 judicial activities, things that are uniquely reserved to the
6 government. And on that point I believe we have the better of
7 it, but if not, I do suggest that jurisdictional discovery is
8 important.

9 So, I've wandered back into Mr. Ainsworth a little
10 bit, but I do want to stress that for my clients, the
11 Beierwalteses, there really is nothing that should prevent
12 Switzerland from returning these pieces. As to them the
13 seizure is arbitrary. As to them it is in violation of
14 international law because there was no articulable suspicion
15 for it. They switched the burden on us; they've kept it; and
16 they haven't repatriated and they haven't compensated us for
17 it.

18 THE COURT: Thank you very much. That's helpful.

19 MR. AINSWORTH: Your Honor, I wish I were as eloquent
20 as Mr. Marmur, and we certainly believe that the same arguments
21 apply to Mr. Aboutaam's pieces. There were two points made
22 that I hadn't yet addressed, and I hope to briefly, and one is
23 the act of state and the other is comity.

24 Your Honor, on comity we had cited in our papers the
25 Simon v. Republic of Hungary case from the District of D.C.,

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1 and that case cited Republic of Argentina v. NML Capital, which
2 is a 2014 Supreme Court decision.

3 The Supreme Court decision said in a discovery context
4 it analyzed the scope of the FSIA and said that the FSIA was a
5 comprehensive replacement for the prior jurisprudence of
6 jurisdiction, including comity. And so the D.C. Circuit said
7 in light of the pronouncement by the Supreme Court in the NML
8 Capital case, there is no comity defense in FSIA cases anymore;
9 we look to the FSIA, and if we have jurisdiction we implement
10 it.

11 And it pointed out that foreign sovereigns are in a
12 unique situation in an FSIA case. What they're basically
13 saying, the sovereign, is let us handle it, and then plaintiff
14 can come back to you.

15 A private party doesn't have that option, so the FSIA
16 says that the foreign sovereign should be liable like any other
17 private party. But another private party doesn't have the
18 ability to say let us decide the issue. A private party would
19 have to be subject to an independent court. Here the sovereign
20 itself wants to decide the issue and send Mr. Aboutaam back
21 here. And if he lost in Switzerland, they would argue then
22 that he is bound by res judicata here. So this comity argument
23 is an end-run around the FSIA exception and shouldn't be
24 condoned.

25 On the act of state, your Honor, the Hickenlooper

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1 Amendment on its face is clear, the act-of-state doctrine does
2 not apply when there are takings in violation of international
3 law.

4 There is also a recent decision by the Second Circuit,
5 the plaintiffs' name is Kashef v. BNP Paribas from June 27,
6 2019. The cite is 2019 U.S. App. Lexis 15120, and in part,
7 your Honor, that court held that the act-of-state doctrine
8 doesn't -- it only applies to official acts, and an act in
9 violation of the country's own law is not an official act. And
10 here we pointed out that nothing that was done with regard to
11 plaintiffs' property was in conformance with the laws of
12 Switzerland. It was in violation of their own law, and
13 therefore it can't be an official act and it can't be subject
14 to the act of state, your Honor.

15 THE COURT: Thank you.

16 A brief response?

17 MR. ANDERSON: I will limit it to three.

18 THE COURT: Thank you.

19 MR. ANDERSON: All the arguments that I just heard
20 counsel made should be made in Switzerland. They are
21 complaining about following Swiss law and Swiss procedure.
22 They are complaining about whether there was reasonable
23 suspicion to attach assets. It strikes me that this sounds
24 like a Rule 41(g) proceeding that we have in this court. So
25 Criminal Rule 41(g) says that "a person aggrieved by an

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1 unlawful search and seizure of property, or by the deprivation
2 of property, may move for the property's return. The motion
3 must be filed in the district where the property was seized."

4 It can't be that you can just skip the Rule 41(g)
5 procedure altogether or its equivalent in Switzerland and then
6 just sue somewhere else. It would be like skipping a 41(g)
7 proceeding here and then going to Switzerland or Mongolia and
8 saying that the United States has taken my property in
9 violation of international law. Whether the Geneva prosecutor
10 complied with Swiss law, that should be determined in
11 Switzerland.

12 And we talked about the delay. We just heard counsel
13 say that they have refused to participate in helping the Geneva
14 prosecutor and the investigators in the criminal proceeding in
15 Switzerland identify the provenance and other aspects of these
16 antiquities. These why this has taken time. The prosecutor
17 has released by their own admission almost half of the
18 antiquities that were initially seized.

19 THE COURT: Do you have any support for the
20 proposition that there is essentially an exhaustion
21 requirement, that there is a requirement that they participate
22 in Switzerland?

23 MR. ANDERSON: So, there are three branches of comity
24 or flavors of comity that we raise, so I will focus directly on
25 the exhaustion. They mentioned the Simon case from the D.C.

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1 Circuit. It's contrary to the Seventh Circuit's decision in
2 Fisher. The United States after the Simon decision came down
3 in the D.C. Circuit told the D.C. Circuit it's wrong. Both of
4 the defendants in Simon and Philip -- there are two companion
5 cases -- are seeking cert to the U.S. Supreme Court right now.
6 So, for all of those reasons Simon does say what they say, but
7 the Seventh Circuit has held that there is an exhaustion
8 requirement. And it's not baked into the Foreign Sovereign
9 Immunities Act, but it's an aspect of international comity.

10 And to further the good relations between countries,
11 we should allow the foreign sovereign the opportunity to hear
12 the exact arguments you just heard. The foreign sovereign's
13 courts are more capable of addressing whether in fact there was
14 reasonable suspicion under the circumstances that Swiss law may
15 require. They are more appropriate to determine whether a
16 Swiss prosecutor complied with Swiss law.

17 Many of the factual debates that plaintiffs have
18 addressed today are more challenging because we are 3,860 miles
19 away from Geneva today. The Swiss courts again are the
20 appropriate forum for that.

21 Second are the cases that they mention. We have
22 talked about Simon, and they raise the Cassirer case from the
23 Ninth Circuit. As we explained in our brief, the Cassirer case
24 in the Ninth Circuit never addressed the two nexus prongs. It
25 was assumed throughout the litigation that Spain never made an

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1 argument that it had an independent right not to be in the
2 case. After the Ninth Circuit decided the Cassirer case, Spain
3 sought cert to the U.S. Supreme Court. The United States brief
4 in support of Spain explained that that issue was never
5 addressed, and in fact Cassirer conceded to the United States
6 that Spain should be dismissed from the case because they could
7 not satisfy the first nexus prong. And that issue had just
8 been missed throughout the litigation. When that case came
9 back from the Supreme Court, in fact they did dismiss Spain
10 from the case. And that's docket entry 119.

11 So, the case they rely on never addressed the issue.
12 And when it was you brought to their attention, they released
13 the sovereign from the case, just as we're asking your Honor to
14 do here.

15 Finally, the other issue was the act-of-state
16 doctrine. I believe counsel just said that if the foreign
17 sovereign is alleged to have violated their own law, it can't
18 constitute an act of state. That's exactly what the
19 act-of-state doctrine is designed to preclude. In fact, U.S.
20 courts are not supposed to sit in judgment of the legality or
21 illegality of sovereign acts taken by a foreign government
22 within their own territory. That's the entire point of the
23 doctrine. They are assumed to be valid if taken within their
24 own territory.

25 And this is an issue of separation of powers. The

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1 Executive branch is uniquely charged to determine whether a
2 foreign sovereign is complying with its own laws. It's not for
3 the Judicial branch to make that determination. So, again, I
4 respectfully submit that that was not a correct articulation of
5 the act-of-state doctrine, and in fact it precludes this Court
6 from making exactly the determination that was just asked.

7 Finally, both with respect to the legal issues and the
8 jurisdictional discovery that was requested, I think it's
9 important to keep in mind the practical effect and consequences
10 here.

11 The aggregate effect of the legal arguments that
12 counsel for the plaintiffs is making is that this court would
13 have jurisdiction over any act in exercise of a foreign
14 government's police powers if plaintiffs can allege that it
15 violated local procedures or was arbitrary, and that loss of
16 immunity would extend to every aspect of the foreign state.
17 That takes the immunity scalpel of the Foreign Sovereign
18 Immunities Act and transforms it into a sledgehammer.

19 And we need to remember that immunity is a reciprocal
20 enterprise. The immunity that we afford to foreign sovereigns
21 in this country is the same immunity that the United States
22 enjoys abroad. And with respect to jurisdictional discovery,
23 practical considerations highlight why the court should act
24 with great restraint before going down that road.

25 They're asking for discovery from a foreign prosecutor

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1 to justify whether he acted arbitrarily in the midst of an
2 ongoing investigation. It's not clear what the end game is
3 here. Is it to enjoin a foreign criminal prosecutor from
4 engaging in that investigation? Are we going to declare the
5 property rights of property, hundreds or thousands of pieces
6 that are located halfway around the world? They've already
7 dropped claims relating to a number of the pieces of property
8 here, and yet the complaint still asks for \$90 million of
9 compensation for assets that have not been taken.

10 These are again just the practical considerations of
11 why the Court should rightly exercise great hesitation both
12 before exercising jurisdiction but even ordering jurisdictional
13 discovery from any of the defendants here.

14 Immunity is not just immunity from liability; it's
15 immunity from the attendant burdens of litigation, and that
16 extends to discovery as the cases that we cited in our letter
17 describe.

18 If the Court has no further questions ...

19 THE COURT: That's it.

20 All right. Thank you all. This was very well briefed
21 and argued. I will reserve decision, but thanks. Have a nice
22 afternoon.

23 (Decision reserved)
24
25